No. 79-678

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,

Appellant,

v.

CITY OF SAN DIEGO, *et al.*,

Appellees.

On Appeal from the Supreme Court of California

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

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Interest of the *Amicus*

The State of New Jersey has filed a separate *amicus curiae brief* in this matter because resolution of the issues raised here will undoubtedly affect important and wide ranging legislative programs carefully fashioned to preserve the environment and the resources of this State.

Appellant challenges a decision of the California Court of Appeal which had been directed by the Supreme Court of California to reconsider its earlier disposition in light of *Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979). Thus, that part of the *Agins* holding which the Court did not reach last term is again presented for review. As in *Agins,* the California court has held that a landowner who claims that he has been deprived of substantially all use of his property because of restrictive land use legislation may not seek damages in inverse condemnation but, rather, must seek invalidation of such legislation by way of an action for declaratory relief or administrative mandamus.

If this decision is reversed by the Court, New Jersey's ability to develop innovative and flexible land use programs which address major environmental concerns will be seriously hampered. It is unfortunately true that entire water supply systems have been declared unsafe in New Jersey. Hazardous chemicals have been dumped indiscriminately over the land. In large part, such pollution has been brought about by haphazard growth and development. We know now that our resources are finite and that we must preserve whatever is not yet irretrievably lost. Land use controls are an important means by which the State's resources can be protected. If the California decision is reversed, however, responsible public officials will fear the financial consequences should good faith attempts to limit land use be held to "take" private property.

The New Jersey Legislature has enacted a series of comprehensive land use statutes which promote orderly and appropriate development while insuing that the State's resources are not squandered. These regulatory programs form the basis for a State effort to halt the deterioration

of the environment and, at the same time, create a framework for rational, planned growth.

The first such environmental land use legislation, N.J.S.A. 58:1-26 *et seq.,* was passed in response to recurring flood hazards exacerbated by intensive development along stream corridors throughout the State. Its purpose was "to safeguard the public against danger from the waters impounded or affected by . . . structure[s]" within the channel of any stream. N.J.S.A. 58:1-26. This statute provided some measure of flood protection by controlling development which altered the capacity of streams to carry and retain storm water.

More recently, L. 1979, ch. 359 (originally enacted as L. 1962, ch. 19 and codified at N.J.S.A. 58:16A-50 *et seq.*), established a delineation and regulatory program for flood prone areas so as to permit the State to more effectively deal with the flooding problems encountered in New Jersey river basins. Pursuant to this legislative mandate the State Department of Environmental Protection (hereinafter "DEP") has promulgated regulations which establish prohibited uses and exceptions thereto, non-regulated uses and regulated uses. See N.J.A.C. 7:13-1.4, 1.5, 1.6. Structural development and alteration of ground contours and water channels are generally prohibited in the floodway, as are the storage and processing of pesticides, various types of waste and hazardous materials; low hazard uses such as agriculture and recreation are permitted or not regulated. The Supeiror Court of New Jersey has held that this regulatory scheme, as applied to land located within the floodway, has not resulted in a taking without compensation contrary to the "taking" clause of the Fifth Amendment to the United States Constitution. *Usdin and Hirsch* v. *State,* 173 N.J. Super. 311, 414 A.2d 280 (Law

Div. 1980); *Schroth* v. *DEP,* No. A-229-78 (App. Div. N.J. Mar. 25, 1980), certif. denied, —— N.J. —— (May 30, 1980).

The delineation of flood hazard areas reflects a new understanding of their importance as natural flood retention basins. The importance of the State's coastal wetlands was also recognized by the New Jersey Legislature in 1970 by the passage of the Wetlands Act, N.J.S.A. 13:9A-1 *et seq.* This Act directs the Commissioner of the DEP to inventory and map the State's wetlands and authorizes him to adopt "orders regulating, restricting or prohibiting dredging, filling, removing, or otherwise altering, or polluting coastal wetlands." N.J.S.A. 13:9A-2. Under N.J.S.A. 13:9A-4 no person may conduct a "regulated activity" on mapped wetlands without a permit; however, N.J.S.A. 13:9A-6 specifically provides that any person whose lands are affected by an order or permit may file a complaint in the Superior Court of New Jersey "to determine whether such order or permit so restricts or otherwise affects the use of his property as to deprive him of the practical use thereof." In such a case, if the court finds that there has been an unreasonable exercise of the police power the Legislature has expressly approved but one remedy—the invalidation of the order or permit as applied to the complainant's property.

In the seventeen years prior to the passage of the Wetlands Act, an average of 1,900 acres of New Jersey coastal wetlands were lost to development each year. Since the Act the DEP has permitted the development of only 375 acres through the issuance of 116 permits (as of August 31, 1977). In two cases where permits have been denied the New Jersey courts have determined that the individual plaintiffs were not thereby deprived of the practical use of their lands. *American Dredging Co.* v. *State,*

169 N.J. Super. 18, 404 A.2d 42 (App.Div. 1979), and *Carton* v. *State of New Jersey,* No. A-638-73 (App. Div. N.J. Jan. 27, 1978).

The wetlands actually encompass a small part of the New Jersey coastal area regulated by the DEP. The Coastal Area Facility Review Act of 1973, N.J.S.A. 13:19-1 *et seq.* (hereinafter "CAFRA"), is the State's major coastal legislation. This statute is a comprehensive legal mandate for the DEP to control and plan the development of a "unique, irreplaceable and delicately balanced" area of New Jersey known as the coastal zone. See N.J.S.A. 13:19-2; N.J.S.A. 13:19-16. The DEP was given the task of weighing the need to preserve New Jersey's coastal environment against competing economic pressures through permit decisions which balance these interests according to the statutory dictates.

The CAFRA statute requires that an applicant submit a rigorous environmental analysis of a proposed project and its impact upon the site and the surrounding region. N.J.S.A. 13:19-7. Only if it is found that the project will cause minimal impairment may a CAFRA permit issue and, even then, the DEP is given wide latitude to impose conditions upon the project if its construction would "tend to violate the purpose and intent of the act" or if it would "materially contribute to an already serious and unacceptable level of environmental degradation or resource exhaustion." N.J.S.A. 13:19-11.

Where an applicant has been denied a permit to construct a facility within the coastal area, he may challenge that denial through an administrative appeal process. In one such case, an applicant has sought approval for a housing development to be constructed, in part, along the natural water's edge where the seasonal high water table is at the surface; in another, a natural area suitable

for agricultural uses because of its highly fertile soils has been proposed as a site for similar residential development. Both applicants have alleged that the DEP's refusal to allow the proposed development constitutes a "taking" without just compensation.

Two other major regional planning efforts based primarily on a careful balance between environmental values and economic pressures have been authorized by the New Jersey Legislature. In 1969, by enacting the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:7-1 *et seq.*, the Legislature created the Hackensack Meadowlands Development Commission (hereinafter HMDC) to oversee the orderly reclamation and development of approximately 21,000 acres of salt water meadows in the lower Hackensack River basin. This land is low and flat and the geology and soils make drainage and construction difficult. Many areas in the district have been used as a dumping ground for municipal wastes and the Hackensack River has been contaminated by the discharge of large quantities of sewage and other impurities. A governmental body with regional land use powers and technical expertise to coordinate development while protecting the meadowlands environment was urgently needed. See N.J.S.A. 13:17-1.

The HMDC was charged with the task of formulating a Master Plan to guide development in the District. During the period when the Plan was being prepared, interim zoning measures were adopted whereby further development was permitted only on the fringes of the District for a 26 month period. This zoning was unsuccessfully challenged as a taking in *Meadowlands Regional Development Agency* v. *Hackensack Meadowlands Development Commission,* 119 N.J. Super. 572, 293 A.2d 192 (App. Div. 1972). In 1972, the HMDC adopted its final Master Plan,

including codes and standards covering land use, comprehensive zoning, subdivisions, building construction and solid waste disposal. Large areas in the Meadowlands, generally undeveloped, were zoned for open space and recreational uses; much of this land is valuable marshland and/or adjacent to the waterways which criss cross the District. Since these zoning restrictions may well reduce the profit that can be derived from the land, they are likely to be attacked as confiscatory.

Most recently, the State of New Jersey has embarked on a bold and important new venture in regional land use planning. The Pinelands Protection Act, N.J.S.A. 13:18A-1 *et seq.*, directs a massive planning effort which may well become a model for other ecologically sensitive areas of the nation subject to intense development pressures. The Pinelands of New Jersey contain about one million acres of pristine pine oak forest, cedar bogs and wetlands and extensive ground and surface water resources of high quality which provide a unique habitat for a wide diversity of rare, threatened and endangered plant and animal species. See *N.J. Builders Association* v. *DEP,* 169 N.J. Super. 76, 404 A.2d 320 (App. Div.), certif. denied, 81 N.J. 402, 408 A.2d 796 (1979). The area covers 20% of New Jersey's total land mass and is the largest contiguous semi-wilderness in the urban corridor extending from Boston to Washington, D.C.

In late 1978, Congress recognized that "there is a national interest in protecting and preserving" the unique ecology of the Pinelands for "the residents of and visitors to the areas." The area was designated as the "Pinelands National Reserve," and an appropriation of $26 million in federal funds was authorized to purchase land of critical ecological value and to devise a comprehensive plan for the management of the Reserve. 16 U.S.C. §471i.

Echoing the concerns of Congress, and decrying the "current pace of random and uncoordinated development and construction" which poses "an immediate threat to the resources" of the Pinelands, the New Jersey Legislature enacted the Pinelands Protection Act as a complement to the federal legislation. N.J.S.A. 13:18A-2. The Act creates a 15 member Pinelands Commission which is mandated to prepare, adopt and implement a comprehensive management plan for the entire area. N.J.S.A. 13:18A-8. Pending adoption of the plan, stringent limits were placed upon any construction or development within the Pinelands. N.J.S.A. 13:18A-14.

Both the federal legisation and the State Act require the Pinelands comprehensive management plan to consider and detail a wide variety of land and water protection and management techniques, including zoning and regulation derived from State and local police powers, development and use standards, permit systems, and acquisition of conservation easements and other interests in land. 16 U.S.C. §471i(f)(3)(A); N.J.S.A. 13:18A-8(d)(1). Both Congress and the State legislature have specifically directed that the management plan "include a policy for the use of State and local police power responsibilities to the *greatest extent practicable* to regulate the use of land and water resources . . ." (16 U.S.C. §471i(f)(3)(B); N.J.S.A. 13:18A-8(d)(2) (emphasis added). By providing for protection of areas of critical ecological importance through purchase, and protection of the rest of the vast Pinelands through regulation, both legislatures have sought to safeguard the entire area in the public interest.

The Pinelands Commission adopted a plan for the central core of the Pinelands on August 8, 1980, and is expected to complete work on the remainder of the plan by December 15, 1980. Under the State Act, the adopted com-

prehensive management plan supersedes all other zoning laws for the area and no construction or development is permitted unless it conforms to the plan. N.J.S.A. 13:18A-10(c). The plan has already been challenged in State court on the basis that it "takes" land without just compensation. *City of Brigantine, et al.* v. *Pinelands Commission,* No. A-312-80 (App. Div. N.J. filed September 22, 1980). Moreover, the stringent interim limitations now in effect in the Pinelands have generated hundreds of requests for administrative review. A number of applicants have raised the "taking" issue against the Commission in federal court. *Hovson's, Inc.* v. *U.S.,* No. 80-1469 (D. N.J. filed May 21, 1980); *Hardt* v. *U.S.,* No. 80-2325 (D. N.J. filed July 24, 1980).

This series of comprehensive statutes enacted by the New Jersey Legislature represents innovative approaches to regional land use control. Such statutes are required if important environmental concerns are to be properly addressed. Historically, development in New Jersey and other areas of this country has largely proceeded on a piecemeal basis through local zoning centered on local, parochial needs. A major result has been the destruction of natural resources that, in many instances, is irreversible. Only in this last decade has there been a State and regional effort to halt irresponsible development and preserve the environment.

The California courts have recognized that the appropriate remedy where land use controls are found to violate the property rights of landowners is invalidation of those controls. This approach is necessary in order to prevent the undermining of future land use planning. A reversal by the Court could impose serious financial burdens on small municipalities and even greater impacts at the State and regional levels. Government officials charged

with planning and regulatory responsibilities for environmentally important areas would fear potential liability in those many situations where the public interest collides with development pressures. Government agencies could suffer severe financial hardship even though officials acted in good faith and in accordance with the best available technical and legal advice. The State's land use planning efforts would be rendered nugatory in such circumstances.

Clearly the State of New Jersey has a vital interest in compelling a private property owner to seek invalidation of zoning restrictions rather than a remedy in inverse condemnation.

ARGUMENT

Invalidation of regulatory restraints which deprive a landowner of substantially all use of his property affords complete and adequate relief consonant with the Fifth and Fourteenth Amendments to the United States Constitution.

It has long been a principle of law established by the Court that government may, pursuant to its police power, impose limitations on the use of real property in order to protect the public health, safety and welfare. *Miller* v. *Schoene,* 276 U.S. 272 (1928); *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Mugler* v. *Kansas,* 123 U. S. 623 (1877). Under traditional due process analysis, an exercise of the regulatory authority of the State must bear a substantial relation to a legitimate governmental purpose. Morever, the means chosen must be reasonably necessary to achieve the ends sought and not unduly oppressive upon private individuals. *Penn Central Trapsp. Co.* v. *New York City,*

438 U.S. 104 (1978); *Goldblatt* v. *Hempstead,* 369 U.S. 590 (1962). In the land use context, regulation may become unduly oppressive and therefore unreasonable when limitations on use become so restrictive as to deprive a landowner of substantially all use of his property. *Nectow* v. *Cambridge,* 277 U.S. 183 (1928). As stated by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* fifty eight years ago:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

This rule blends the due process unreasonableness test with the "taking" limitation of the Fifth Amendment to the United States Constitution. The result is a balancing of public benefits and private losses. Indeed, Justice Holmes framed the issue in terms of a continuum in which the permissible exercise of the police power gradually merges into forbidden restraints on private property:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment

> of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power." *Id.* at 413.

Pennsylvania Coal Co. v. *Mahon* clearly mandates a case by case analysis in which the public purpose of the challenged legislation is weighed against the extent of deprivation imposed on private property. *See, Penn Central Transp. Co.* v. *New York City,* 438 U.S. at 123-128; *see generally* W. Stoebuck, *Nontrespassory Takings in Eminent Domain* (1977); F. Bosselman, D. Callies & J. Banta, *The Taking Issue* (1973); *Development in the Law —Zoning,* 91 Harv. L. Rev. 1027, 1481-1482 (1978).

The case at bar involves local zoning which limits the use of appellant's property to light industry and agriculture with an open space general plan designation. Appellant claims that the zoning regulations combined with the open space element of the city's general plan render its property useless, and it therefore seeks damages in inverse condemnation. The California Court of Appeal decided that "[u]nlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the State's exercise of its police power is not entitled to compensation." (J. S. App. G., p. 3-4). Relying upon the ruling in *Agins* v. *City of Tiburon,* 23 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), the court held that a landowner's remedy for government's "alleged overzealous use of the police power" is injunctive or declaratory relief, not damages by way of inverse condemnation. (J. S. App. G., p. 4).

In *Agins,* the California Supreme Court determined that a landowner who alleges that zoning regulations deprive him of substantially all use of his land is limited to seeking invalidation of the restrictive legsilation under

the Fifth Amendment to the United States Constitution. In reaching this conclusion, the court reaffirmed the balancing test enunciated by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon.* It suggested, however, that the Holmes' rule —"if regulation goes too far it will be recognized as a taking"—had "generated some confusion" in regard to whether damages were available as a remedy in zoning cases. It pointed out that the Supreme Court did not grant damages in that case but rather had "declared void the exercise of police power which had limited the company's right to mine its land." 23 Cal. 3d at 274, 598 P.2d at 29, 157 Cal. Rptr. 376.

In fact, the Court has awarded damages in inverse condemnation only in those cases involving non-regulatory governmental action or where there has been a physical invasion of property by government. *See, e.g., United States* v. *Causby,* 328 U.S. 256 (1946); *See also,* Note, *Inverse Condemnation: Its Availability in Challenging the Validity of Zoning Ordinances,* 26 Stan. L. Rev. 1439, 1442, 1443 n. 16 (1974). This is consistent with traditional understanding of the inverse condemnation cause of action. As explained in *United States* v. *Clark,* 100 S. Ct. 1127, 1130 (1980), there must be an intention by government to occupy the land, coupled with actual physical occupation, in order to trigger a remedy in inverse condemnation. *See, e.g., Dugan* v. *Rank,* 372 U.S. 609 (1963); *Hurley* v. *Kincaid,* 285 U.S. 95 (1932). As recently noted by the First Circuit, in no case has a federal court "ordered a state or local government unit to pay for a diminution of the value of a piece of property caused by a zoning regulation." *Pamel Corp.* v. *Puerto Rico Highway Authority,* 621 F. 2d 33, 35 (1st Cir. 1980).

The teaching of these cases is that where an actual physical invasion, or action tantamount to such inva-

sion, is involved, then the Fifth Amendment mandates an award of "just compensation." But, where substantially all use has been denied as a result of overly restrictive regulation, invalidation of the restrictive statute restores the land to the owner. While physical takings are largely irreversible, removal of regulatory restraints which offend the Constitution permits a litigant to utilize his property as before. Due process does not and should not require more.

Moreover, policy considerations strongly militate against a damages remedy in cases involving unconstitutional restrictions on property. Early in this century, Justice Sutherland recognized that proliferating development would require new controls by government:

> "'The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly.'" *Euclid* v. *Ambler Realty Co.*, 272 U.S. at 392 (citation omitted).

Such limitations are even more necessary today. We have either squandered our natural resources or rendered them unusable for many generations. The results of our indiscriminate use of the land have been forcefully brought to public attention by the closure of contaminated public water supply systems and the shortage of vitally needed resources. We must plan for the future through broad state and regional land use programs designed to halt deterioration of the environment and reclaim our dwindling resources.

As already noted New Jersey has, particularly in the last decade, moved vigorously to control development and

preserve the land. It has done so through the enactment of comprehensive legislation regulating flood prone areas, wetlands, the coastal zone, and other unique, ecologically sensitive regions such as the Hackensack Meadowlands and the Pinelands. In each case the New Jersey Legislature has provided an administrative mechanism for review and adjustment in order that an overall comprehensive plan can be individually tailored to fit the physical realities of particular parcels of land. Such a process affords a property owner the opportunity to demonstrate that the uses permitted under substantive regulations are incompatible with any beneficial use of his land.

In those instances resulting in a determination of incompatability the goals and objectives of the plan can be reassessed. The appropriate officials may then choose either to adjust the plan or to acquire the property in question. In the event that an agency in good faith erroneously applies overly restrictive regulations to a particular property, judicial invalidation of such regulations will trigger the same type of administrative reassessment. In this manner, the landowner is protected and government planning objectives can be met.

The adverse impacts of a remedy in inverse condemnation are not counterbalanced by any commensurate benefits to individual litigants. Invalidation of restrictive legislation is an appropriate and adequate remedy for landowners temporarily denied the beneficial use of their lands.

CONCLUSION

It is respectfully submitted that a landowner aggrieved by legislation which substantially limits the use of his property may seek to establish the invalidity of such legislation but may not recover damages in inverse condemnation. Therefore, the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

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